IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

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NO.77-1838

* * * * *

SAVE OUR CEMETERIES, INC., ET AL.,
PETITIONERS

VERSUS

THE ARCHDIOCESE OF NEW ORLEANS,
INC., ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the District Court is unreported. The opinion of the Fifth Circuit Court of Appeals is reported at

568 F.2d. 1074.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals err in affirming the trial court's granting of summary judgment as to plaintiffs' Sherman Act claims where plaintiffs failed to produce any countervailing evidence to defendants' affidavits and evidence in support of said motion?

2. Did the Circuit Court of Appeals err in affirming the trial court's granting of summary judgment as to plaintiffs' Civil Rights claims where plaintiffs' failed to allege or prove state action and/or any class-based invidiously discriminatory animus on the part of the defendants?

STATEMENT OF THE CASE

These proceedings were initiated on August 30, 1976, wherein plaintiffs sought declaratory and injunctive relief against the named defendants to the effect that the defendants would be enjoined from demolishing any existing "wall vaults" or crypts situated within St. Louis Cemetery No. 2.

Simultaneously with the filing of the original complaint, plaintiffs likewise sought a temporary restraining order, and, by agreement of counsel for all parties and the court, this matter was heard by the trial court with respect to the granting of a temporary restraining order on September 2, 1976.

The hearing for temporary restraining order consumed a full day of the court's time, and exhaustive testimony and documentation was produced by plaintiffs at

that hearing in support of their argument that irreparable injury would result to the plaintiff and the class of plaintiffs they sought to represent if the defendant, New Orleans Archdiocesan Cemeteries, was either ordered or permitted to demolish the wall vaults in St. Louis Cemetery No. 2.

Following the hearing on temporary restraining order, the court denied plaintiffs relief with a finding that there was no evidence introduced to indicate any immediate danger or irreparable injury to any party inasmuch as it was the uncontradicted testimony of all defendants that the Archdiocese was not, in fact, at any time in the immediate or foreseeable future making plans to demolish any of these wall vaults. Furthermore, it was the testimony of witnesses of the City of New Orleans

that they did not in fact, nor did they intend at any future time to issue any order of demolition for the particular structures in question, and that should either the Archdiocese or the City of New Orleans at some future date make a determination that such course of action was advisable or necessary, that certain legal steps would have to be taken at a state level under state law in order to determine the ownership of various vaults, persons who were interred therein, notification to such parties, etc. On the basis of such uncontradicted testimony, the court therefore, determined that plaintiffs were in no immediate dange of injury and injunctive relief was denied.

Four days following the court's ruling on injunctive relief, the defendants herein filed a Motion to Dismiss and Motion for

Summary Judgment on September 7, 1976.

Prior to that time, however, plaintiffs voluntarily dismissed the City of New Orleans and all of its agents or employees who had heretofore been named as defendants, alleging therein that it was shown "to the satisfaction of the plaintiffs that the defendant, City of New Orleans, and defendants, Robin and Thompson, were acting within the course and scope of their administrative functions as city officials and not in collaboration or in concert with the Archdiocese of New Orleans, Inc. and New Orleans Archdiocesan Cemeteries,...".

The court fixed defendant's Motions to Dismiss and for Summary Judgment to be heard on October 20, 1976 (almost six weeks from the date upon which these motions were filed and notice given of such filing to plaintiff's counsel.)

During the interim between the filing of these Motions for Summary Judgment and to Dismiss and the hearing, plaintiffs made no effort to initiate any discovery procedure with respect to the taking of depositions, submission of interrogatories, inspection of documents, etc., nor did plaintiffs file any countervailing affidavits or other evidence to contradict the supporting documents which were filed with the Motion for Summary Judgment.

At the hearing on October 20, 1976, plaintiffs likewise produced no further testimony or documentary evidence in support of their claim, other than what had originally been produced and filed in the hearing for temporary restraining order some six weeks previously.

Following the argument of counsel to the court, the court at that time rendered

its decision granting the defendants' Motion for Summary Judgment and dismissing plaintiffs' case, without prejudice.

ARGUMENT

1. THERE IS NO CONFLICT BETWEEN THE OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HEREIN AND OTHER DECISIONS OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, SECOND, THIRD OR NINTH CIRCUITS AS TO WHETHER SUMMARY JUDGMENT IS PROPER IN AN ANTI-TRUST CASE AS THE CASE AT BAR.

* * *

Petitioners cite various decisions of other Circuits to the effect that full discovery should be allowed prior to any dismissal of an anti-trust claim as being contrary to the decision herein. However, each of the cases thusly cited is readily distinguishable from the case at bar, and no conflict exists in relation thereto.

Petitioners cite the Second Circuit decision of Frey Ready-Mix Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551 (2d Cir. 1977) as being in conflict with this opinion.

That case was a complex anti-trust suit extending over five years of litigation. Two days prior to discovery cut-off, appellants made their first request for documents. Appellee objected and simultaneously moved for summary judgment, which was subsequently granted by the trial court.

In reversing, the Second Circuit found that the lack of adequate discovery was not the fault of the plaintiff, but rather the manner in which the trial court established discovery rules for the parties. The court observed:

> "...but here we do not have recalcitrant plaintiffs. Rather, we have plaintiffs who, partially through their own lack of prosecution but at least as much because of delays by the defendants and insufficient supervision by the court or

> magistrate were not able to begin discovery until 4½ years after they had initiated the suit, and then were not able to get a court ruling on defendants' objections to plaintiffs' first request for documents before summary judgment overtook them." (554 F.2d at p. 556)

Furthermore, the court cited, with approval, the decision of the Fifth Circuit in, Rosemound Sand and Gravel Co. v Lambert Sand and Gravel Co., 469 F.2d 416 (5th Cir. 1972) relied upon and cited by the Court in the instant opinion.

It is respectfully submitted that Rosemound, supra., is particularly apposite herein.

As in the instant case, Rosemound failed to avail himself of available discovery and other procedural remedies prior to granting defendant's motion to dismiss. Commenting on plaintiffs lack of diligence, the court found that:

> "The decision was delayed and Rosemound neither sought any other discovery nor proffered any further affidavits in support of the original motion. On this record we cannot say that Rosemound was foreclosed from submitting all of the jurisdictional facts to the court. The court's decision on the question of subject matter jurisdiction prior to trial was therefore not an abuse of discretion under Fed. R.Civ.P.12(d).:

and further:

> "the complaint contains only the barest conclusory statements of jurisdiction and Rosemound has added little to shore up its initially weak position." (469 F.2d at p.418)

Similarly, in the instant case, the Court of Appeals found that:

> "Appellant had six (6) weeks within which to prepare for the hearing, and yet appellant's attorney admitted at the hearing that he had not even begun discovery. Because the appellants made no showing of cause for their failure to begin discovery, and because the appellants had sufficient time to do so before hearing, we reject this argument." 568 F.2d 1078.

The cited decisions of the other Circuit Courts of Appeals are likewise distinguishable on the facts as being inappo-

site hereto and no way conflicting.

Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3rd Cir. 1978) involved a reversal of a dismissal on a finding that the trial court had erred in granting motion to dismiss on the face of the pleadings since the court had made a finding that "factual discovery was irrelevant." The trial court erroneously had concluded that plaintiff must have alleged the existence of "an agreement", and the absence of such allegation was, standing alone, sufficient for dismissal.

Petitioners cite Costlow v. U.S., 552 F.2d 560, as being contrary to the holding herein. However, in Costlow, supra., a Federal Tort Claims action, the plaintiff was effectively deprived of the benefit of answers to interrogatories previously propounded to the government and

found to be essential to establishing a valid cause of action properly alleged in the complaint.

The Ninth Circuit opinion in, Moore v. Mathews & Co., 473 F.2d 328 (9th Cir. 1973) involved the reversal of the trial court's granting of summary judgment after the commencement of a trial by jury at the completion of exhaustive pre-trial discovery. The court therein merely found that the pleadings and evidence already in the record raised substantial issues of fact for the jury, and summary judgment at that stage of the proceedings was inappropriate.

2. THERE IS NO CONFLICT BETWEEN THE OPINIONS OF THIS HONORABLE COURT AND THE OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT AS TO WHETHER SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS WAS PROPER IN AN ANTI-TRUST CASE SUCH AS THE

ONE HEREIN PRESENTED FOR REVIEW.

* * *

Petitioners cite this Court's opinion in, Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 48 L.ed 2d 338 (1976) as a contrary holding to the decision herein.

That case involved Sherman Act (15 U.S.C., Sec. 1-2) issues wherein plaintiffs alleged monopolistic practices in the providing of hospital services in the Raleigh, N.C. area.

The Fourth Circuit Court of Appeals affirmed dismissal of the complaint on a finding that there was no showing that the business involved was other than "local", nor did plaintiffs allege any substantial effect on interstate commerce.

This Court was constrained to reverse that holding in the light of the allegations of the complaint which, inter alia, alleged that 80% of the hospital's

purchases, a substantial number of its patients, and revenue from insurance companies all come from outside the state of North Carolina.

No such allegations were made or substantially urged herein. As the Fifth Circuit herein observed:

> "In the case on appeal, the appellants' complaint merely states the conclusions that the appellees "are engaged in interstate commerce and/or in business affecting and involving interstate commerce" and are "causing an undue burden on interstate commerce."
>
> "The appellants did not introduce any evidence at the hearing to indicate that the appellees' actions fell within the jurisdictional reach of the Sherman Act, although the appellants received notice of the appellees' motions approximately six weeks before the hearing on the motions."

Petitioners further urge this court to find the decision herein in conflict with the opinion in, Norfolk Monument Co. Inc. v. Woodlawn Memorial Gardens, Inc.,

394 U.S. 700.

Although factually perhaps analogous, the posture of that litigation makes it totally inapposite.

This Court held therein that the trial court erred in granting summary judgment in the fact of extensive discovery and a voluminous fact record which clearly demonstrated material facts to be in dispute and which raised genuine issues for jury determination. In the instant case, no such record or disputed factual issues are present.

3. THERE IS NO CONFLICT BETWEEN THE OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HEREIN AND THE OPINIONS OF THE COURTS OF APPEALS OF THE TENTH, SEVENTH AND SECOND CIRCUITS AS TO WHETHER SUMMARY JUDGMENT IS PROPER IN A CIVIL RIGHTS CASE AS PRESENTED HEREIN FOR REVIEW.

* * *

None of the decisions cited by petitioners support their contention that they were unreasonably deprived of discovery opportunities under the circumstances of the case.

As the Court of Appeals herein observed, petitioners made no effort to obtain discovery or seek delay prior to the actual hearing on summary judgment. Further, the court found that petitioners had ample opportunity to initiate pre-trial discovery and were unable to offer the court any substantial argument to the effect that material or relevant facts were not before the court.

Those cases cited as being in conflict herewith are therefore all distinguishable on the facts, and in no manner conflicting with this opinion.

Lavin v. Ill. High School Athletic Assn, 527 F. 2d 58 (7th Cir. 1975), a

sex discrimination case, was reversed because the trial court did not afford plaintiff reasonable opportunity to file countervailing affidavits to motion for summary judgment.

In Weisman v. LeLandais, 532 F.2d 308 (2nd Cir. 1976) the Second Circuit, unlike the Fifth Circuit herein, found "as for the Civil Rights Act, sufficient facts are stated (in the complaint) to constitute state action" (532 F.2d at p. 311).

Similarly, that same Circuit Court, in Egelston v. State University College at Genesco, 535 F.2d 752 (2nd Cir. 1976) merely held that sufficient facts were alleged to avoid a motion to dismiss, but intimated that dismissal by Rule 56 summary judgment might have been appropriate.

Petitioners further argue that the holding herein is contrary to this Court's opinion in Adickes v. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970). This decision, however, clearly set forth the requirement that an essential element of any Sec. 1983 claim is not only a showing that defendants acted "under color of law", but also that there be a finding of "state action".

In the instant case, the court found no allegation or evidence supportive of either element.

Additionally, Petitioners argue that the decision is in conflict with this Court's decision in Griffin v. Breckinridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L. ed 2d 338 (1971) as that case developed the theory of "private conspiracies" in a Sec. 1985 (3) action.

The opinion of the Fifth Circuit herein is entirely consistent with that

opinion and subsequent decisions. As the court observed in Griffin, supra.,

> "The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by all."
> 403 U.S. at 102, 91 S. Ct. at 1798.

In that regard, the Court herein observed:

> "A finding of racial discrimination is a necessary prerequisite to a grant of relief pursuant to § 1981, § 1982 and § 1985(3). Village Harbor, Inc. v. United States, 559 F.2d 247, 249 (5th Cir. 1977); Morgan v. Odem, 552 F.2d 147, 149 (5th Cir. 1977); Campbell v. Gadsden County District School Board, 534 F.2d 650, 653-55 nn.8 and 9 (5th Cir. 1976)." 568 F.2d at p. 1078.

Petitioners, at p. 37 of their Petition for Writs herein, state:

> "The Court below held that for claims under 42 U.S.C. Sec. 1981, state action was required."

It is then argued, in support of this

application for review, that such holding is manifestly contrary to this Court's decision in Jones v. Meyer, 392 U.S. 409, 88 S. Ct. 2186 (1968).

Respondents respectfully suggest to the Court that it did not specifically reach that decision in Jones, supra., inasmuch as the Court had under consideration only a cause of action therein under 42 U.S.C. 1982, and the language of the opinion, although subsequently used by the courts in relation to 1981 cases, did not directly concern that statute.

Nevertheless, petitioners' argument in relation thereto can be summarily dispatched, for they have misread the opinion of the Fifth Circuit herein. The Court clearly did not hold as suggested. Rather, in affirming dismissal on the 1981

claims it held:

> "A finding of racial discrimination is a necessary prerequisite to a grant of relief pursuant to § 1981, § 1982 and § 1985(3). Village Harbor, Inc. v. United States, 559 F.2d 247, 249 (5th Cir. 1977); Morgan v. Odem, 552 F.2d 147, 149 (5th Cir. 1977); Campbell v. Gadsden County District School Board, 534 F.2d 650, 653-55 nn.8 and 9 (5th Cir. 1976)." (emphasis added) 568 F.2d 1078.

The reported decision, at 568 F.2d 1077, does address itself to the "state action" requirement for relief, but only as it relates to a 1983 action, not one under 1981. The Court therein observes:

> "A finding of state action is a necessary prerequisite to a grant of relief pursuant to § 1983. Morgan v. Odem, 552 F.2d 147, 148 (5th Cir. 1977)."

There is, therefore, no conflict with the holding herein and this Court's appreciation of state action requirements vis-a-vis 42 U.S.C. 1981, c.f. Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970).

4. THERE IS NO CONFLICT BETWEEN

THE OPINION HEREIN AND THE OPINIONS OF EITHER THIS COURT OR OF ANY OTHER CIRCUIT AS TO WHETHER THERE WAS AN ABUSE OF DISCRETION BY THE TRIAL COURT HEREIN IN FAILING TO PERMIT PETITIONERS TO AMEND THEIR COMPLAINT PRIOR TO DISMISSAL BY SUMMARY JUDGMENT.

* * *

Petitioners urged the Court to grant this writ on the assertion that the Fifth Circuit erred by affirming summary judgment when the trial court had not permitted petitioners to amend their complaint to set forth a cause of action.

It is submitted that all of the decisions cited in support of that proposition are inapposite herein. Firstly, the record of this case indicates that no

formal Motion to Amend was ever made to the Court, orally or by pleading. The only time at which that plea was made to the Court was during oral argument by Petitioners' counsel when, after the Court had announced its decision, counsel queried if he might have leave to amend on the basis of a transcript from the original TRO hearing.

Likewise, this issue was not seriously raised or argued to the Fifth Circuit and, therefore, was not properly before the Court for determination. Nevertheless, Rule 15, F.R.C.P. permits of amendment to pleadings, even after the granting of summary judgment and prior to appeal. Freeman v. Continental Gin Company, 381 F.2d 459 (5th Cir. 1967). However, amendment either prior or subsequent to summary judgment, should not be permitted where the Motion is dilatory

or there is no showing of merit. Petitioners failed to demonstrate any factual allegation or legal theory which had not been urged in the original complaint, which they could urge by amendment to state a claim upon which relief could be granted.

5. THERE IS NO CONFLICT BETWEEN THE OPINION HEREIN AND THE DECISIONS OF THIS COURT AND OTHER CIRCUITS AS TO THE AFFIRMATION OF DISMISSAL BY SUMMARY JUDGMENT ON THE BASIS OF THE FAILURE OF PETITIONERS TO INITIATE OR COMPLETE DISCOVERY.

* * *

Petitioners again misread the thrust of the Court's opinion herein in urging this Court to grant writs, in that the trial court erred in granting summary judgment when Petitioners had only six (6) weeks to prepare for hearing. All of

the decisions cited by Petitioners in support of that proposition concern dismissal under Rule 12 or 41 for failure or delay in prosecution of litigation. Petitioners therefore overlook the language of the opinion herein which held that this dismissal should be treated as the grant of a Motion for Summary Judgment. 568 F.2d, at p. 1077.

The Motion was therefore granted, not because of Petitioners failure to timely prosecute the matter, but rather, because of Petitioners failure to produce any evidence to countervail the evidence in support of Motion for Summary Judgment. The Court found, in answer to Petitioners' argument, that they had sufficient time to prepare by way of discovery, that no discovery had been in fact attempted and, more importantly, Petitioners had sufficient time to begin discovery or seek

continuance or other relief but likewise failed to act in that manner. 568 F.2d at p. 1078.

Finally, for the benefit of the Court, Respondents wish to call the Court's attention to the fact that Petitioners have attached a copy of the slip opinion of the Fifth Circuit in this case to their petition for Writ of Certiorari, rather than a copy of the officially reported decision of the Court as appears at page 1074 of Volume 568 of the Federal Reporter, Second Series. It is noted by Respondents, for the benefit of the Court, that significant changes were made by the Fifth Circuit in the language of that opinion subsequent to the printing and distribution of the official opinion in the Federal Reporter and, therefore, the Court should be guided in its considera-

tion of this petition by the language of the opinion as it appears in the official reports, rather than as set forth in the slip opinion attached to the petition filed herein.

CONCLUSION

For the foregoing reasons, the petition for Certiorari sought herein should be denied.

Respectfully submitted:

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August 7, 1978
DATE

BY _____
THOMAS A. RAYER

CERTIFICATE

I hereby certify that I have served a copy of the above and foregoing brief in opposition to Petition for Writ of Certiorari on opposing counsel, Louis R. Koerner, Jr., by depositing a copy of same postage prepaid to him on this 25th day of July, 1978 at 730 Camp St. New Orleans, La. 70130.

_____
THOMAS A. RAYER